

Commercially Useful Function Guide

Office of Business and Economic Opportunity

July 21, 2011



Commercially Useful Function Guide

Prepared for:

Disadvantaged Business Enterprises
Small Businesses
Disabled Veteran Business Enterprises
Prime Consultants
Prime Contractors
Local Agencies

Prepared by:

California Department of Transportation
Office of Business and Economic Opportunity
1823 14th Street
Sacramento, CA 95811
1-866-810-6346

An electronic copy of this guide can be found at: <http://www.dot.ca.gov/hq/bep/>



“Caltrans improves mobility across California”

Acknowledgements

Thank you to the California Department of Transportation (Caltrans) personnel, the small business, disadvantaged business, and disabled veteran business communities, and prime contractors, who all contributed towards the completion and accuracy of this Commercially Useful Function Guide on federally- and State-funded projects.

Special thanks to:



Olivia Fonseca, Deputy Director, Office of Business and Economic Opportunity (OBEO)

Sherri Gastinell, Chief, External Equal Opportunity Program, OBEO

Peg Bergmann, Manager, Contract Evaluation Unit, OBEO

Ramon Carlos Jr., Manager, Business Services Unit, OBEO

Gretchen Winczner, DBE Program Liaison, Business Services Unit, OBEO

For questions regarding this guide, please contact Gretchen Winczner at (916) 324-1098.



“Caltrans improves mobility across California”

Table of Contents

	PAGE
Executive Summary	5
Definition of Terms	7
Disabled Veteran Business Enterprise	9
Disadvantaged Business Enterprise	11
Small Business	14
Monitoring and Enforcement	16
Official Questions and Answers	17
Q: How is DBE participation counted toward goals?	17
Q: May a recipient require that a DBE trucking firm own more than one truck in order to be regarded as performing a commercially useful function?	19
Q: How does the part 26 requirement that a DBE firm must do 30 percent of the work of a contract with its own forces to perform a commercially useful function relate to some recipients' requirements that all firms perform a great percentage of the work on all contracts?	19
Q: Is a DVBE still required to demonstrate commercially useful function?	20
Q: What if the state department's evaluation results indicate my listed DVBE is not performing a CUF and now I don't meet the DVBE goal. Can I challenge the state department's decision?	20



"Caltrans improves mobility across California"

Executive Summary

Caltrans is committed to the California Small Business (SB) and Disabled Veteran Business Enterprise (DVBE) Programs as well as the federal Disadvantaged Business Enterprise (DBE) Program which includes Underutilized Disadvantaged Business Enterprises (UDBEs).

The purpose of this Commercially Useful Function (CUF) guide is to help certified SBs, DBEs, UDBEs, and DVBEs understand the State and federal requirements applicable to these programs and to ensure that participation by one of these certified businesses may be counted towards an individual contract goal established for that type of business. Contractors and program participants should always keep in mind that participation by a certified business only counts for credit toward a contract goal when: (1) the business has been properly certified by the appropriate authority for the work category for which it is listed on a particular contract; and (2) the certified business is performing a CUF on the contract for which it has been listed. Each of these factors will be separately evaluated each time a certified business is listed for credit towards a contract goal. A certified business can be defined as a broker, manufacturer, supplier, provider of professional services, contractor, regular dealer, etc., as defined in the regulations applicable to the particular program at issue.

In order for a DBE/UDBE's work to be counted toward a contract goal, it must meet several requirements. First, the DBE/UDBE must be certified by the California Unified Certification Program (CUCP) and must be certified for the specific work category proposed to be performed by a DBE/UDBE on a given contract. Second, the contractor and/or DBE/UDBE must demonstrate that the certified DBE/UDBE is performing a CUF on the contract for which it is listed. Whether a DBE/UDBE is performing a CUF on any particular contract is a fact-specific determination that is examined independently each time a DBE/UDBE is listed and may differ for each contract.

The determination of the work to be performed by a DBE/UDBE is made during the certification process using the analysis in 49 Code of Federal Regulations (CFR) section 26.71(n). The regulations state, in part, that certification to a firm is granted only for specific types of work in which the socially and economically disadvantaged owner(s) perform. To determine if the firm is qualified to perform the type of work, a review is made by the CUCP certification agency of the licenses, experiences, expertise, resources, etc. An onsite visit is also made to verify equipment, supplies, facilities and owner(s).

Similarly, in order to be counted for credit towards a contract goal, SBs and DVBEs must be certified by the Office of Small Business and DVBE Services (OSDS) with the California Department of General Services (DGS) for the specific work category pertaining to the work performed by the SB and DVBE. They must apply for formal

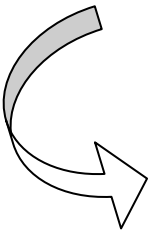


"Caltrans improves mobility across California"

certification and identify the appropriate North American Industry Classification System (NAICS) codes specific to the type of work they perform. Final approval of the certification is made by the OSDS, and the applicant is notified of their certification status.

The purpose of the CUF requirement is to prevent certified businesses from acting as an “extra participant” or a “pass through” by providing only the appearance of participation to meet the SB, DBE, UDBE, or DVBE goal on a contract.

A business performing a CUF:



- Is responsible for the execution of a distinct element of work in the contract.
- Carries out its obligation by actually performing, managing, and supervising the work involved.
- Performs work that is normal for its business, services, and function.
- Performs or exercises responsibility for at least 30 percent of the total cost of its contract with its own work for and is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practice.

Additional requirements apply to trucking operations as described herein and in regulation.

An SB, DBE, UDBE, DVBE firm is not considered to be performing a CUF if the SB, DBE, UDBE, DVBE firm’s role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of an SB, DBE, UDBE, or DVBE participation towards meeting a stated goal.

The following pages further define a CUF for an SB and DVBE on State-funded contracts, and a CUF for DBE and UDBE on US Department of Transportation (USDOT) federally-funded contracts.



Note: For further information, please also refer to other guides such as, “A Guide to Counting Disadvantaged Business Enterprise (DBE) Participation – DBE, DBE Trucker, Broker, Manufacturer, Supplier, and DBE in Professional Services” and “Business Plan for DBE Outreach on Federally-Funded Projects,” which are located on the Caltrans Web site at <http://www.dot.ca.gov/hq/bep/>.

**References to DBEs include UDBEs, but references to UDBEs do not include all DBEs.*



“Caltrans improves mobility across California”

Definition of Terms

Broker – Any individual or entity, or combination thereof, that does not have title, possession, control, and risk of loss of materials, supplies, services, or equipment provided to an awarding department, unless one or more certified disabled veterans has 51 percent ownership of the quantity and value of the materials, supplies, services, and of each piece of equipment under the contract.

Contractor – Any person(s), or any sole proprietorship, firm, partnership, joint venture, corporation, or combination thereof, who submits a bid and enters into a contract with a representative of a State agency, department, governmental entity, or other officer empowered by law to enter into contracts on behalf of the State of California.

Disabled Veteran Business Enterprise (DVBE) – A DVBE business is defined as a business that is at least 51 percent owned by a disabled veteran who has at least a 10 percent service connected disability, a veteran of the United States military, and a California resident. This certification is issued by the California DGS.

Disadvantaged Business Enterprise (DBE) – Socially and economically disadvantaged individuals who own at least 51 percent interest and also control management and daily business operations of a for-profit small business. This certification is issued by the CUCP.

African Americans, Asian-Pacific and Subcontinent Asian Americans, Hispanics, Native Americans and women are presumed to be socially and economically disadvantaged. Other individuals may qualify as socially and economically disadvantaged on a case-by-case basis.

Goal – A numerically expressed objective that awarding departments and contractors are required to make efforts to achieve.

Independently Owned and Operated – A business concern that independently manages and controls the day-to-day operations of its own business through its ownership and management, without undue influence by an outside entity or person that may have an ownership and/or financial interest in the management responsibilities of the business.

Manufacturer – A firm that operates or maintains a factory or establishment that produces on its premises the materials, supplies, articles, or equipment required under the contract.



“Caltrans improves mobility across California”

Definition of Terms (Continued)

North American Industry Classification System (NAICS) – Developed as the standard for use by federal agencies in classifying business establishments for the collection, analysis, and publication of statistical data related to the business economy of the United States. NAICS was designed and documented in such a way to allow business establishments to self-code.

Prime Contractor – The contractor who contracts directly with the awarding authority.

Professional Services – Professional services that are infrequent, technical, or unique functions performed by independent contractors or consultants whose occupation is the rendering of such services.

Regular Dealer – A firm that owns, operates, or maintains a store, warehouse, or other establishment in which the materials, supplies, articles, or equipment as described and required under the contract are bought, kept in stock and regularly sold/leased to the public in the usual course of business.

Small Business (SB) – A Small Business is independently owned and operated, principal office is located in California and owners live in California, business grosses \$14 million or less over the previous three tax years, and is not dominant in its field of operations. This certification is issued by the California DGS.

Supplier – One who makes available for use (materials, supplies, equipment), furnishing a very important element for project completion.

Underutilized Disadvantaged Business Enterprise (UDBE) – DBE firms, as defined by the 2007 Disparity Study for Caltrans highway related federally-funded contracts. UDBEs are identified as African American, Asian-Pacific American, Native American and women-owned firms. To find a copy of the 2007 Disparity Study, please go to: http://www.dot.ca.gov/hq/bep/study/disparity_study.htm

Work Code – A code that identifies the various components or function areas of what is associated with the products or services of a particular company. The determination of the work to be performed by a DBE is made during the certification process using the analysis in 49 CFR section 26.71(n). The regulations state, in part, that certification to a firm is granted only for specific types of work in which the socially and economically disadvantaged owners perform. To determine if the firm is qualified to perform the type of work, a review is made by the Caltrans certification unit of the licenses, experiences, expertise, resources, etc.



“Caltrans improves mobility across California”

A Guide to Commercially Useful Function

Disabled Veteran Business Enterprise

The State of California established the DVBE program to provide certified DVBE firms with a greater opportunity to compete for a portion of the State funds awarded annually through either direct award or subcontracted efforts as well as to promote self-reliance for California's disabled veterans by offering veterans the opportunity to gain experience in business. In this program, the prime contractor takes all necessary and reasonable steps to ensure that DVBEs have the opportunity to participate in the performance of a contract. It is the bidder's responsibility to make a sufficient portion of the work available to DVBEs as subcontractors, suppliers, manufacturers, professional service providers, and/or brokers.

A DVBE firm is defined as a certified business that is at least 51 percent owned by a disabled veteran who has at least a 10 percent service connected disability, a veteran of the United States military, and a California resident. Note: DVBE certification is issued by the California DGS. Certification verification is the responsibility of the prime contractor prior to bid submittal.



All certified DVBE firms that bid on or participate in a State-funded contract must perform a CUF on the contract. This is done to prevent businesses from acting as a "pass through" when identified as participating on a State-funded contract. If a DVBE is not performing a CUF on a contract, the certification may be revoked as stated in the California Government Code section 14842 (3)(e). The DVBE firm must be responsible for a distinct element of the contract as its normal business functions.

Credit for DVBE participation as a prime contractor will count as 100 percent of the contract price provided the DVBE prime is performing a CUF. Credit for participation of DVBE subcontractors, suppliers, or services will be 100 percent of the dollar value of the DVBE performance provided the DVBE is performing a CUF. State departments will evaluate the DVBE participation prior to the award of the contract in order to determine if the listed DVBE is performing a CUF and thus apply the appropriate DVBE credit. DVBE brokers awarded a contract under the DVBE goal provisions must disclose their broker status to the State department prior to contract award.

As it states in the Military and Veteran Code 999(b)(5), CUF is determined by:

(B) "Disabled veteran business enterprise contractor, subcontractor, or supplier" means any person or entity that has been certified by the administering agency pursuant to this article and that performs a "commercially useful function," as defined below, in providing services or goods that contribute to the fulfillment of the contract requirements:



"Caltrans improves mobility across California"

- (i) A person or an entity is deemed to perform a “commercially useful function” if a person or entity does all of the following:
- (I)(aa) is responsible for the execution of a distinct element of the work of the contract.
 - (ab) carries out the obligation by actually performing, managing, or supervision the work involved.
 - (ac) performs work that is normal for its business services and functions.
 - (II) is not further subcontracting a portion of the work that is greater than that expected to be subcontracted by normal industry practices.
 - (ii) a contractor, subcontractor, or supplier will not be considered to perform a “commercially useful function” if the contractor’s, subcontractor’s, or supplier’s role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of a disabled veteran business enterprise participation.

To ensure that a CUF is being performed, Caltrans staff may perform an on-site review of the DVBE business operations. The purpose of a site visit is to ensure that certified DVBE firms that bid and provide services on State-funded projects are actually performing a CUF. Prime contractors are encouraged to verify that the DVBE firm is able to perform a CUF by viewing the DVBE on-site review reports at: <http://dot.ca.gov/hq/bep> listed under “DVBE CUF Onsite Reviews.”



Example of a DVBE performing a CUF: A prime contractor listed O’Quigley Highway Services, a certified DVBE company, to provide traffic control for a road project. The DVBE stated they will provide labor (a traffic technician and supervisor), the equipment (a truck with a mounted flashing arrow-board), tools, materials, and work signs (advance warning signs). In order to prove that a CUF was being performed, the prime contractor confirmed that the DVBE company was performing work services that are normal for the type of business it is, ensuring that the company will have its own labor or supervisor for the work (in this case the DVBE has both), and has all the resources available for this portion of work on the contract.

*Example of a DVBE **not** performing a CUF:* A prime contractor listed Rough ‘N Readie, Inc., a certified DVBE company, to provide steel drums for a hazardous waste cleanup project. The DVBE stated they will supply the steel drums. Even though Rough ‘N Readie, Inc., can supply the steel drums, they are not performing a CUF because they do not have any steel drums in their inventory (not supplying items that are a part of their normal business functions). Rough ‘N Readie will contact a steel drum supplier, the supplier will hire a trucking company to haul the steel drums to the project location, and the steel drum supplier, not Rough ‘N Readie, will arrange the dates for the delivery of the drums to the project location. In this situation, Rough ‘N Readie’s role is limited to that of an extra participant.



“Caltrans improves mobility across California”

Disadvantaged Business Enterprise

A DBE firm is a socially and economically disadvantaged individual who own at least 51 percent interest and also control management and daily business operations of a for-profit small business as defined by the Small Business Administration. African Americans, Asian-Pacific and Subcontinent Asian Americans, Hispanics, Native Americans and women are presumed to be socially and economically disadvantaged. Other individuals may qualify as socially and economically disadvantaged on a case-by-case basis.



Caltrans will determine if the DBE/UDBE is performing a CUF by evaluating whether the DBE/UDBE is performing the work in the work category for which they have been certified as well as the amount of work subcontracted, industry practices, whether the amount the firm is to be paid under the contract is equal with the work it is actually performing and the DBE/UDBE credit claimed for its performance of the work.

As stated in 49 CFR section 26.55 (1), “A DBE performs a commercially useful function when it is responsible for the execution of the work of the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved. The DBE must also be responsible, with respect, to materials and supplies used on the contract, for negotiating price, determining quality and quantity, ordering the material and installing and paying for the material itself.”

Example: A prime contractor listed Stoick Specialty Coatings Equipment, Inc., a certified DBE, to provide concrete and pavement raising work for a project. The subcontractor stated that they will provide labor (both technicians and a supervisor), the equipment, tools, materials (polyurethane foam), and work signs (traffic control). In order to prove that a CUF was being performed, Caltrans was able to confirm that the U/DBE subcontractor was performing work services that are normal for its type of business, and also confirmed that Stoick would have its own laborers and supervisor for the work, and is able to perform this portion of work without the need to further contract any services to another subcontractor.

A DBE/UDBE does **not** perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE/UDBE participation. Also, an DBE/UDBE does not perform a CUF if it does not exercise responsibility for at least 30 percent of the total cost of the contract with its own work force, or if the DBE/UDBE subcontracts out a greater portion of the work of a contract than would be expected (on the basis of normal industry practice for the work involved) or if it merely orders material or supplies from a third party for delivery by a third party.



“Caltrans improves mobility across California”

As stated in 49 CFR section 26.55 (2)(3), “A DBE does not perform a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation. A DBE does not perform a CUF if it does not perform or exercise responsibility for at least 30 percent of the total cost of its contract with its own work force, or the DBE subcontracts a greater portion of the work of a contract than would be expected on the basis of normal industry practice for the type of work involved.”

Example: A prime contractor listed Amundi Concrete, a DBE certified only as a broker as indicated by the work category in their DBE certification. Amundi will provide concrete and grinding at a project site. The DBE is unable to perform the work due to the fact they do not own any grinders or concrete. Amundi Concrete lists Hallveig, Inc., to provide the concrete and services needed. Amundi Concrete then gives the prime contractor Hallveig, Inc.’s information along with an invoice for the broker services Amundi Concrete provided in this situation. Amundi Concrete would not be counted for credit toward the contract goal both because they are certified only as a broker and because they did not perform a CUF because they only arranged for Hallveig, Inc. to perform the work.

Prior to bid award, Caltrans will conduct an evaluation to confirm whether a DBE/UDBE is performing a CUF in order to credit the DBE/UDBE participation towards the goal. If it is determined that the DBE/UDBE is not certified to perform the work for which it has been listed or that it is not performing a CUF, Caltrans will not count the DBE/UDBE participation towards the goal. When a DBE/UDBE is presumed not to be performing a CUF, the DBE/UDBE may present evidence to rebut this presumption. The determination as to whether the DBE is performing a CUF should be based upon the type of work involved and normal industry practices.

At the job site, the DBE/UDBE is monitored to ensure that CUF is performed. Caltrans uses the following methods to monitor CUF:

1. The Resident Engineer (RE) ensures that inspectors know what items of work each DBE/UDBE is responsible for. Inspectors will notify the RE of apparent changes in DBE/UDBE participation.
2. A DBE/UDBE performs a CUF when it is responsible for execution of the work for the contract and is carrying out its responsibilities by actually performing, managing, and supervising the work involved.
3. Contractors are directed to the DBE/UDBE special provisions for an explanation of the CUF requirements.
4. When a firm other than the listed DBE/UDBE is found performing the work, the RE contacts the prime contractor immediately.



“Caltrans improves mobility across California”

5. Payment for the item or items performed by the firm, which was not listed, will be withheld from the prime contractor's next progress payment. Payment will not be made for this work until the RE approves a request for a substitution. A letter will be sent to the prime contractor explaining the reasons for the deduction and directs the prime contractor to pursue the appropriate substitution process.



“Caltrans improves mobility across California”

Small Business

An SB is independently owned and operated, the principal office is located in California, the owners live in California, is not dominant in its field of operations, grosses \$14 million or less annually over the previous three tax years, or is a manufacturer that has 100 or fewer employees, per California Government Code section 14837(d)(3).

The certification program serves as a benefit for the SB community as it helps increase opportunities by allowing certified SBs to compete on a more level playing field. This is done by permitting certified SBs competing against non-certified businesses certain advantages to help them achieve increased bid award opportunities through a five percent calculation preference.

All certified SB firms that bid on or participate in a State-funded contract must perform a CUF on the contract. This is done to prevent businesses from acting as a “pass through” when identified as the prime bidder or when identified as a subcontractor, etc. If an SB is not performing a CUF on a contract, certification may be revoked as stated in the California Government Code section 14842(3)(e).

CUF is required when an SB is involved and participates in a State-funded contract. The SB has to be responsible for a distinct element of the contract and normal business functions. They cannot further subcontract their distinct element of work. Also, so that a CUF can be verified, the prime contractor must list who and what part of the work is being done.

As it states in the California Code of Regulations section 1896.4, a CUF for SB participation is determined by:

- (i) The contractor or subcontractor is responsible for the execution of a distinct element of the work of the contract; carrying out its obligation by actually performing, managing, or supervising the work involved; and performing work that is normal for its business services and functions; and
- (ii) The contractor or subcontractor is not further subcontracting a greater portion of the work than would be expected by normal industry practices.
- (iii) The contractor or subcontractor is responsible, with respect to materials and supplies provided on the subcontract, for negotiating price, determining quality and quantity, ordering the material installing (when applicable), and paying for the material itself.
- (iv) A contractor or subcontractor will not be considered as performing a CUF if its role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to achieve the appearance of small business participation.



“Caltrans improves mobility across California”

Example of an SB performing a CUF: A prime contractor listed Greiland Electric Company, a certified SB company, to provide night-time lights and equipment for a project. Greiland Electric Company stated that they will provide labor (to set up and take down light equipment), the equipment (a generator and lights), tools, and materials. In order to prove that a CUF was being performed, the prime contractor confirmed that the SB company was performing work services that are normal for the type of business it is, ensuring that the company will have its own labor or supervisor for the work, and has all the resources available for this portion of work on the contract and will not need to further contract any services to another subcontractor.

*Example of an SB **not** performing a CUF:* A prime contractor listed Broadway Erosion Consulting, a certified SB company, to provide hydraulic mulch for a shoulder widening project. Even though Broadway Erosion Consulting is an SB certified company, they hired another company to haul, deliver and perform the application of the mulch. The SB Company did not perform a CUF because hauling, delivering and performing the work is not a part of their normal business functions.



“Caltrans improves mobility across California”

Monitoring and Enforcement

A certified DBE, UDBE, DVBE, and SB who fails to demonstrate performance of a CUF, when bidding as a prime contractor, will result in that certified bidder being eliminated from consideration. Also, for DBE, UDBE, DVBE, and SB firms who are participating as a subcontractor, failure to demonstrate performance of a CUF will possibly result in the de-certification of that business. Furthermore, businesses who fraudulently obtain a certification as a DBE, UDBE, DVBE, and SB for purposes of obtaining a State or federal contract may be suspended from doing business with the State or federal agencies.

For DBE firms, as stated in 49 CFR section 26.107(a) "... attempts to participate in a DOT-assisted program as a DBE on the basis of false, fraudulent, or deceitful statements or representations or under circumstance indicating a serious lack of business integrity or honesty, the Department may initiate suspension or debarment proceedings against you under 49 CFR part 29."

Pursuant to Government Code 14842, the following may be imposed on a business that obtains certification as a SB or a DVBE by having given incorrect, incomplete, or fraudulent information and has been awarded a contract to which it would not have been awarded otherwise:



1. Pay to the State any difference between the contract amount and what the State's costs would have been if the contract had been properly awarded.
2. Pay to the awarding State agency and the department an amount that is equal to the costs incurred to investigate the small business certification.
3. Be assessed a penalty in an amount of not more than ten percent of the amount of the contract involved.
4. The small business will be suspended from business with the State for a period of not less than three years and not more than ten years.

Failure to carry out the requirements of Section 999 of the Military and Veterans Code for DVBE firms will constitute a material breach of contract and may result in termination of the contract or other remedy that Caltrans deems appropriate.

As found in Public Contract Code 10115.10n (a)(1), "It shall be unlawful for a person or firm to knowingly and with intent to defraud, fraudulently obtain ... aid another in fraudulently obtaining ... acceptance or certification as a minority, women, or disabled veteran business enterprise... (b) Any person who violates ... is guilty of a misdemeanor and shall be liable for a civil penalty..."



"Caltrans improves mobility across California"

Disadvantaged Business Enterprise Program:

For more information regarding DBE Program Regulations, please see the USDOT document which addresses questions and answers as they pertain to 49 CFR part 26 on their Web site at: <http://osdbu.dot.gov/DBEProgram/dbeqna.cfm>

The following are excerpts from U.S. DOT's Questions and Answers document:

Section 26.55**QUESTION: HOW IS DBE PARTICIPATION COUNTED TOWARD GOALS?**

ANSWER: In a narrowly tailored program, it is important that DBE credit be awarded only for work actually being performed by DBEs themselves. The necessary implication of this principle is that when a DBE prime contractor or subcontractor subcontracts work to another firm, the work counts toward DBE goals only if the other firm is itself a DBE. This represents a change from the existing rule and the SNPRM, which said that all the work of a DBE's contract (implicitly including work subcontracted to non-DBEs) counts toward goals. A few comments urged such a change. The new language is also consistent with the way that the final rule treats goals for DBE prime contractors.

The value of work performed by DBEs themselves is deemed to include the cost of materials and supplies purchased, and equipment leased, by the DBE from non-DBE sources. For example, if a DBE steel erection firm buys steel from a non-DBE manufacturer, or leases a crane from a non-DBE construction firm, these costs count toward DBE goals. There is one exception: if a DBE subcontractor buys supplies or leases equipment from the prime contractor on its contract, these costs do not count toward DBE goals. Several comments from prime contractors suggested these costs should count, but this situation is too problematic, in our view, from an independence and commercially useful function (CUF) point of view to permit DBE credit.

One of the most difficult issues in this section concerns how to count DBE credit for the services of DBE trucking firms. The SNPRM proposed that, to be performing a CUF, a DBE trucking firm had to own 50 percent of the trucks it used in connection with a contract. A number of comments said that this requirement was out of step with industry practice, which commonly involves companies leasing trucks from owner-operators and other sources for purposes of a project. In response to these comments, the Department revisited this issue and reviewed the trucking CUF policies of a number of states. The resulting provision requires DBEs to have overall control of trucking operations and own at least one truck, but permits leasing from a variety of sources under controlled conditions, with varying consequences for DBE credit awarded.



"Caltrans improves mobility across California"

A DBE need not provide all the trucks on a contract to receive credit for transportation services, but it must control the trucking operations for which it seeks credit. It must have at least one truck and driver of its own, but it can lease the trucks of others, both DBEs and non-DBEs, including owner operators. For work done with its own trucks and drivers, and for work with DBE lessees, the firm receives credit for all transportation services provided. For work done with non-DBE lessees, the firm gets credit only for the fees or commissions it receives for arranging the transportation services, since the services themselves are being performed by non-DBEs.

When we say that a DBE firm must own at least one of the trucks it uses on a contract, we intend for recipients to have a certain amount of discretion for handling unexpected circumstances, beyond the control of the firm. For example, suppose firm X starts the contract with one truck it owns. The truck is disabled by an accident or mechanical problem part way through the contract. Recipients need not conclude that the firm has ceased to perform a commercially useful function.

Most commenters who addressed the issue agreed with the SNPRM proposal that a DBE does not perform a CUF unless it performs at least 30 percent of the work of a contract with its own forces (a few commenters suggested 50 percent). This provision has been retained. A commenter suggested that the use of two-party checks by a DBE and another firm should not automatically preclude there being a CUF. While we do not believe it is necessary to include rule text language on this point, we agree with the commenter. As long as the other party acts solely as a guarantor, and the funds do not come from the other party, we do not object to this practice where it is a commonly-recognized way of doing business. Recipients who accept this practice should monitor its use closely to avoid abuse.

One commenter noted an apparent inconsistency between counting 100 percent of the value of materials and supplies used by a DBE construction contractor (e.g., in the context of a furnish and install contract) and counting only 60 percent of the value of goods obtained by a non-DBE contractor from a DBE regular dealer. The two situations are treated differently, but there is a policy reason for the difference. There is a continuing concern in the program that, if non-DBEs are able to meet DBE goals readily by doing nothing more than obtaining supplies made by non-DBE manufacturers through DBE regular dealers, the non-DBEs will be less likely to hire DBE subcontractors for other purposes. As a policy matter, the Department does not want to reduce incentives to use DBE subcontractors, so we have not permitted 100 percent credit for supplies in this situation. Giving 100 percent credit for materials and supplies when a DBE contractor performs a furnish and install contract does not create the same type of disincentive, so the policy concern does not apply. In our experience, the 60 percent credit has been an effective incentive for the use of DBE regular dealers, so those firms are not unduly burdened.



“Caltrans improves mobility across California”

Section 26.55(d), 26.73(a)(1)

QUESTION: MAY A RECIPIENT REQUIRE THAT A DBE TRUCKING FIRM OWN MORE THAN ONE TRUCK IN ORDER TO BE REGARDED AS PERFORMING A COMMERCIALY USEFUL FUNCTION?

ANSWER: Section 26.55(d) provides that, to be regarded as performing a commercially useful function, a DBE trucking company must own at least one truck of its own (which is insured and operable).

Consequently, it would be inconsistent with part 26 for a recipient to require DBE trucking companies to own two or more trucks in order to be regarded as performing a commercially useful function.

This issue, like all issues involving the "commercially useful function" concept, focuses solely on counting DBE participation toward goals, and does not enter into certification decisions (see 26.73(a)(1)).

Section 26.55(c)(3)

QUESTION: HOW DOES THE PART 26 REQUIREMENT THAT A DBE FIRM MUST DO 30 PERCENT OF THE WORK OF A CONTRACT WITH ITS OWN FORCES TO PERFORM A COMMERCIALY USEFUL FUNCTION RELATE TO SOME RECIPIENTS' REQUIREMENTS THAT ALL FIRMS PERFORM A GREATER PERCENTAGE (e.g., 50 PERCENT) OF THE WORK ON ALL CONTRACTS?

ANSWER: A requirement that all firms perform at least 50 percent of the work of a contract with their own forces is a matter of recipient procurement policy that does not conflict with the DOT DBE rules.

For a recipient who has such a requirement, all contractors will necessarily perform more than 30 percent of the work of their contracts with their own forces.

Consequently, all DBE firms subject to this requirement will automatically meet the 30 percent requirement for performing a commercially useful function, since they have to be performing more than that amount of work with their own forces to get a contract in the first place.



"Caltrans improves mobility across California"

Disabled Veterans Business Enterprise Program:

For more information regarding DVBE Program regulations, please see the Department of General Service's (DGS) document titled, "Frequently Asked Questions (And Answers) about AB4x 21 and the Elimination of the Disabled Veteran's Business Enterprise Good Faith Effort" on their Web site at:
<http://www.dgs.ca.gov/pd/home.aspx>

The following are excerpts from the DGS Questions and Answers document:

Question: IS A DVBE STILL REQUIRED TO DEMONSTRATE COMMERCIALLY USEFUL FUNCTION?

Answer: Yes. Military and Veterans Code Section 999(b)(5)(b) defines CUF and requires DVBEs to perform CUF. State departments will continue to evaluate DVBE participation prior to award to determine if the listed DVBE is performing a CUF.

Question: WHAT IF THE STATE DEPARTMENT'S EVALUATION RESULTS INDICATE MY LISTED DVBE IS NOT PERFORMING A CUF AND NOW I DON'T MEET THE DVBE GOAL. CAN I CHALLENGE THE STATE DEPARTMENT'S DECISION?

Answer: Yes. The new law does not change the bidder's right to challenge the State department's decision.



"Caltrans improves mobility across California"